

*BILL LOCKYER*  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



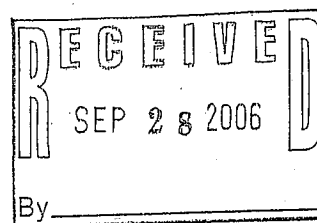
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September 27, 2006

Jerri Dale  
Chief Deputy  
California Children and Families Commission  
501 J Street, Suite 530  
Sacramento, CA 95814



RE: Advice Regarding Advocacy

Dear Ms. Dale:

This is in response to your request for advice regarding California Children and Families Commission (CCFC) staff and officer participation in activities related to Proposition 86, which has qualified for the November ballot. If Proposition 86 passes, the Legislative Analyst's Office projects that it will decrease tobacco product purchases, reducing CCFC revenue, but that its backfill provision will provide approximately \$180 million to Proposition 10 programs in its first year.

In a June 4, 2002, letter, this office provided the CCFC advice regarding advocacy performed for the commission. A copy of that letter is attached. This is an update of that letter.

SHORT ANSWER

Neither CCFC officers nor staff members may work to support or oppose a circulating or qualified ballot measure while on state time, or while acting as representatives of the commission. CCFC, through its officers and staff, may use public funds to provide relevant, unbiased information on issues that will affect the agency. CCFC may not use its resources to influence public opinion regarding a candidate, or a circulating or qualified ballot measure.

DISCUSSION

State agencies and employees are prohibited from using public resources for "campaign activit[ies], or personal or other purposes which are not authorized by law." (Gov. Code §8314(a).) Public resources include "funds, equipment, supplies, telephones, computers . . . and state-compensated time." (Gov. Code §8314(b)(3).) Campaign activities are defined as either expenditures under Government Code section 82025 or contributions under Government Code

ATTORNEY-CLIENT PRIVILEGE

section 82015 but do not include "incidental and minimal use of public resources . . . for campaign purposes including the referral of unsolicited political mail, [and] telephone calls . . . ." (Gov. Code §8314(b)(2).) Thus, individual employees or officers of CCFC cannot participate in campaign activities related to Proposition 86 while on government time or using government resources.

Government Code section 8314 subdivision (d) does not prohibit the use of public resources for "providing information to the public about the possible effects of any bond issue or other ballot measure on state activities . . . provided that (1) the information activities are otherwise authorized by the constitution or laws of the state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment." CCFC is authorized to provide information to the public on some subjects. Specifically, Health and Safety Code section 130105 subdivision (d)(1)(A) addresses the CCFC "Mass Media Communications Account," which is for "expenditures for communications to the general public . . . on subjects relating to and furthering the goals and purposes of this act . . ."<sup>1</sup> Accordingly, CCFC could, consistent with Government Code section 8314, provide information on possible effects of a ballot measure on the goals and purposes of the act provided it is a "fair and impartial presentation of relevant facts."

Public agencies may not, absent "clear and explicit legislative authorization, expend public funds to promote a partisan position in an election campaign." *Stanson v Mott* (1976) 17 Cal.3d 206, 209-210. The CCFC does not have such explicit legislative authorization. As discussed in the 2002 memo, state agencies with statutory authority, like CCFC, can discuss ballot measures only to the point of providing fair and impartial information. *Stanson, supra*, at 219.

In *Stanson*, the director of the California Department of Parks and Recreation used \$5,000 of department funds to promote a state bond measure. He argued that there was general statutory authority for his actions and that they were "analog[ous] to . . . legislative lobbying." *Stanson, supra*, 17 Cal.3d at 215-216, 218. The court rejected these arguments, noting that the government should remain impartial regarding election processes. *Id.* at 218. Although there was statutory authority for the department to speak neutrally on the topic, the court did not find any clear statutory authority for the director's partisan actions. *Id.* at 213, 219. Vague language allowing the state to promote recreation was not enough to authorize the director's actions. *Id.* at 215.

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<sup>1</sup>The statutory language here is similar to the language in Public Resources code section 512. In *Stanson v Mott*, (1976) 17 Cal.2d. 206, at 215, the California Supreme Court found Public Resources code section 512 sufficient to satisfy the first prong of Government Code section 8314 subdivision (d).

#### ATTORNEY-CLIENT PRIVILEGE

It is often difficult to determine which activities are purely informational, as opposed to promotional. In 2006, the California Supreme Court granted review in *Vargas v. City of Salinas* (2005) 135 Cal.App.4th 361, which considered the proper standard for judging whether statements are informational or promotional. The court adopted an express advocacy standard and rejected the argument that examination of the materials' style, tenor, and timing, is compelled by *Stanson*. *Vargas* has been depublished pending review by the Supreme Court.

*Vargas* used the express advocacy standard expressed in *Schroeder v. Irvine City Council*, (2002) 97 Cal.App.4th 174, which was discussed in the June 2002 memo. The "express advocacy" standard comes from definitions of "expenditure," found in the Political Reform Act at Government Code sections 82031 and 82025, and California Code of Regulations, title 2, section 18225, subdivision (b)(2). The Fair Political Practices Commission promulgated this regulation, defining expenditure as something that "expressly advocates . . . if it contains words such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for" or otherwise refers to a clearly identified . . . measure so that the communication, taken as a whole, unambiguously urges a particular result in an election." In *Schroeder*, the court found that it should not look beyond the "textual" content of the brochures to examine the context in which they were produced. *Schroeder*, 97 Cal.App.4th at 188.

The California Supreme Court could expand the scope of prohibited campaign activities. Accordingly, should the CCFC elect to provide information to the public pending the Supreme Court's decision in *Vargas*, we recommend the CCFC act conservatively to avoid future problems. At this time, the most conservative standard is laid out in *Stanson*. Each action should be evaluated by its "style, tenor and timing," to decide if it is purely informational, or if it instead is taking one side of an issue. *Stanson, supra*, 17 Cal.3d at 222. *Stanson* adopted the language found in a 1960 Attorney General opinion regarding a school bond measure. 35 Ops.Cal.Atty.Gen 112 (1960). The school district had placed an advertisement in the local paper the day before the election. The advertisement did not specifically urge voters to take a position; however, the advertisement outlined the "classroom emergency" facing the district. The Attorney General opined that the advertisement was not a proper use of public resources, reasoning that "the style, tenor and timing of the advertisement . . . points . . . to the conclusion that the publication was designed for the purpose of influencing the voters. . . ." *Stanson, supra*, 17 Cal.3d at 222 note 8, quoting 35 Ops.Cal.Atty.Gen 112, at 114.

#### CONCLUSION

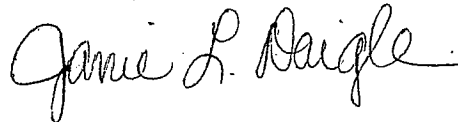
As stated in the June 2002 memo, CCFC must take great care to provide impartial information when addressing ballot measures. Both officers and employees of CCFC must not work in furtherance of one side of a ballot initiative. Until the California Supreme Court clarifies

Jerri Dale  
September 27, 2006  
Page 4

ATTORNEY-CLIENT PRIVILEGE

the appropriate line between promotional and informational activities, CCFC should act with caution. If it chooses to engage in informational activity, the activities need to be objective, and not timed as to create an influence on the voters.

Sincerely,

A handwritten signature in cursive script, reading "Janie L. Daigle".

JANIE DAIGLE  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

Attachment

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